A **INAS FAIQAH MOHD HELMI v. KERAJAAN MALAYSIA & ORS**

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
ROHANA YUSUF JCA
ABANG ISKANDAR JCA
B [CIVIL APPEAL NO: B-01-200-05-2013]
13 JANUARY 2015

DAMAGES: *Special damages – Claim for – Medical negligence – Infant suffered from quadriplegic spastic cerebral palsy from child birth and treatment at hospital* C *– Claim for costs of nursing care provided by infant's mother until about two years old – Whether costs of taking care of infant different from that of ordinary child*

DAMAGES: *Future costs – Future medical expenses – Infant suffered from quadriplegic spastic cerebral palsy from child birth and treatment at hospital – Suggestion by expert witness that infant might require orthopaedic surgery in future* D *– Whether sum awarded appropriate and justified – Whether pain and sufferings factored in*

TORT: *Negligence – Medical negligence – Claim for damages – Infant suffered from quadriplegic spastic cerebral palsy from child birth and treatment at hospital – Appeal against decision of High Court – Whether multiplicand used in arriving at* E *decided sum for damages correct – Whether damages awarded by High Court appropriate*

TORT: *Damages – Negligence – Medical negligence – Infant suffered from quadriplegic spastic cerebral palsy from child birth and treatment at hospital – Claim for special, pre-trial and future damages – Appeal against decision of High Court – Whether damages awarded by High Court appropriate*
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The appellant, an infant suing through her father as her next friend, suffered from quadriplegic spastic cerebral palsy arising from child birth and treatment at the respondents' hospital. The appellant filed a claim for damages based on medical negligence in the High Court and was awarded a G total sum of RM1,193,442.39. However, the appellant contended that the sum awarded by the High Court was low and hence, the present appeal. The appellant submitted that some of the items of damages were not taken into account, specifically, (i) special damages, namely, for cost for nursing care provided by the appellant's mother until about two years old; (ii) pre-trial damages, namely, nutritious food at RM400 per month for 44 months; and H multiplicand of 20 instead of 24; (iii) future damages and claims, namely, costs for treatment and medical care at a private hospital; need of equipment; vehicle for the disabled; services of two Filipina maids to care for the appellant; training and education for the care provider; care and parent's stress; and pain and suffering from surgery; and (iv) future claims post I 18 years old and for holidays. The appellant was also dissatisfied with the costs awarded by the trial judge in the sum of RM100,000 and sought RM115,000 instead.

Held (dismissing appeal)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) The care for the appellant from birth to the age of two years old was not different from that of a normal child. In fact, the appellant's mother agreed that the cost of taking care of the appellant during such infancy would be the same as that of an ordinary child. An expert opinion on such a subject would be a mere opinion which the trial judge was not bound to accept. (paras 9-11)

(2) It has always been the duty of parents to provide nutritious food to their children and there was no expert finding that the appellant required extraordinary food. According to the appellant's mother, the appellant was fed with a normal diet, except that it had to be blended to make it soft. (para 12)

(3) Testimonies of rehabilitation experts on the life expectancy were pure estimates since there is no statistics on experiences in Malaysia. The statistics relied upon by the experts in providing the estimate were based on the experiences in Europe. It was not wrong for the trial judge to estimate the life expectancy within the range of 30 to 40. (paras 14 & 15)

(4) The medical attention required by the appellant would be in the area of physiotherapy and rehabilitation which would be available at the public hospital. There was no evidence to show that the appellant was denied treatment at public hospitals and the reason given by the appellant's father for not pursuing the treatment at the public hospital because of long wait was not sufficient proof of non-access. (paras 17 & 18)

(5) In awarding RM136,000 for the claim of future equipment based on the recommendation by the respondents, the trial judge had taken into account factors such as the physical build, living condition and home environment as well as the mental state of the appellant. The order was well-reasoned and there was no error. The appellant also claimed the cost of RM122,000 with vehicle replacement every seven years at RM17,428 per year. The car model suggested by the appellant was of luxurious class. The proposal by the respondents was more appropriate. (paras 20, 25, 31 & 32)

(6) The appellant would not be active like a normal child and there was no reason why two Filipina maids would be required. The help of an Indonesian maid would be more appropriate and less expensive. Furthermore, the appellant's mother was a kindergarten teacher. There was no necessity for the training of the care provider in view of the parent's experience. She would be able to guide the care provider. Free trainings of this nature is available at public hospitals. The award made for cost of future care by the parent at RM300 per month was premised on 1/3 of the amount claimed at RM800 per month. The principle of granting 1/3 claim for future cost is an acceptable principle for future award of future damages (paras 26-29)

(7) Based on the recommendation of the appellant's expert witness, the appellant might require orthopaedic surgery which would cost RM50,000. However the trial judge only awarded RM25,000. The trial judge's reasons were justified. In awarding RM350,000 to the appellant, Her Ladyship had already factored in all the pain and sufferings. (para 34)

(8) The appellant's claim of RM200,000 per month for future cost of accommodation and living expenses upon reaching the age of 18 was disallowed because the trial judge had, in her assessment of damages, awarded costs for modification of the house to accommodate the appellant and Her Ladyship had taken into account the life span of the appellant. The item of claim for holidays has never been awarded by the courts. (paras 36 & 37)

(9) The trial judge had exercised her discretion properly under O. 59 of the Rules of Court 2012 and had taken into account the relevant facts in awarding the sum RM100,000. There was no good reason to disturb Her Ladyship's exercise of discretion as the issue on costs remains at the discretion of the trial judge. (paras 40)

(10) The total damages awarded by the trial judge must also be taken as a whole instead of particularising it item by item because, even if the one item appears to be too low, there are areas where the trial judge may be more generous. (para 41)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang bayi yang menyaman melalui bapanya sebagai sahabat wakil, mengalami quadriplegic spastic cerebral palsy akibat kelahiran dan rawatan di hospital responden-responden. Perayu memfailkan tuntutan ganti rugi berdasarkan kecuaian perubatan di Mahkamah Tinggi dan telah diawardkan sejumlah RM1,193,442.39. Walau bagaimanapun, perayu menghujahkan bahawa jumlah yang diawardkan oleh Mahkamah Tinggi adalah rendah dan dengan itu, rayuan ini. Perayu menghujahkan bahawa sebahagian daripada item-item ganti rugi tidak diambil kira, khasnya, (i) ganti rugi khas, iaitu bagi kos penjagaan oleh ibu perayu sehingga umur dua tahun; (ii) ganti rugi pra-perbicaraan, iaitu bagi makanan berkhasiat berjumlah RM400 sebulan selama 44 bulan; dan multiplicand 20 dan bukan 24; (iii) ganti rugi dan tuntutan masa hadapan, iaitu bagi kos penjagaan rawatan dan perubatan di hospital swasta; keperluan peralatan; kenderaan bagi orang kurang upaya; perkhidmatan dua orang pembantu Filipina untuk menjaga perayu; latihan dan pendidikan untuk penjaga; tekanan dan penjagaan oleh ibu bapa; dan kesakitan dan penderitaan akibat pembedahan; dan (iv) tuntutan masa hadapan selepas 18 tahun dan percutian. Perayu juga tidak berpuas hati dengan kos yang diawardkan oleh hakim bicara yang berjumlah RM100,000 dan sebaliknya memohon jumlah RM115,000.

Diputuskan (menolak rayuan)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Penjagaan perayu dari kelahiran hingga umur dua tahun tidaklah berbeza dengan kanak-kanak normal. Malah, ibu perayu juga bersetuju bahawa kos penjagaan perayu semasa bayi adalah sama dengan kanak-kanak biasa. Pendapat pakar mengenai satu-satu perkara hanyalah sekadar pendapat yang mana hakim bicara tidak terikat untuk ikuti.

(2) Adalah sentiasa menjadi tanggungjawab ibu bapa untuk memperuntukkan makanan yang berkhasiat untuk anak-anak mereka dan tiada dapatan pakar bahawa perayu memerlukan makanan istimewa. Menurut ibu perayu, perayu diberikan diet normal, kecuali makanannya harus dikisar agar lembut.

(3) Keterangan pakar-pakar pemulihan mengenai jangka hayat merupakan anggaran semata-mata kerana tiada statistik berdasarkan pengalaman di Malaysia. Statistik yang disandarkan oleh pakar-pakar dalam mengemukakan anggaran tersebut adalah berdasarkan pengalaman di Eropah. Tidak salah untuk hakim bicara menganggarkan jangka hayat dalam kadar 30-40.

(4) Perhatian perubatan yang diperlukan oleh perayu adalah dalam ruang lingkup fisioterapi dan pemulihan yang terdapat di hospital awam. Tiada keterangan untuk menunjukkan bahawa perayu dinafikan rawatan di hospital-hospital awam dan alasan yang diberikan oleh bapa perayu dalam tidak mendapatkan rawatan di hospital awam kerana masa menunggu yang lama adalah tidak cukup untuk membuktikan ketiadaan akses.

(5) Dalam mengawardkan RM136,000 bagi tuntutan peralatan masa hadapan berdasarkan cadangan oleh responden-responden, hakim bicara telah mengambil kira faktor-faktor seperti fizikal, keadaan hidup dan persekitaran rumah serta keadaan mental perayu. Perintah tersebut adalah beralasan dan tidak khilaf. Perayu juga menuntut kos RM122,000 dengan gantian kenderaan setiap tujuh tahun dengan RM17,428 setahun. Model kereta yang dicadangkan oleh perayu adalah berkelas mewah. Cadangan yang dibuat oleh responden-responden lebih bersesuaian.

(6) Perayu tidak akan aktif seperti kanak-kanak normal dan tiada sebab mengapa dua orang pembantu Filipina diperlukan. Pembantu Indonesia adalah lebih sesuai dan lebih murah. Tambahan lagi, ibu perayu adalah seorang guru tadika. Melihatkan pada pengalaman ibu bapa, tiada keperluan untuk melatih penjaga. Ibu perayu boleh membimbing penjaga tersebut. Latihan-latihan percuma juga terdapat di hospital-hospital awam. Award bagi kos penjagaan masa hadapan oleh ibu bapa pada kadar RM300 sebulan adalah berdasarkan 1/3 daripada jumlah

yang dituntut iaitu RM800 sebulan. Prinsip membenarkan tuntutan 1/3 bagi kos masa hadapan adalah prinsip yang boleh diterima bagi award masa hadapan untuk ganti rugi masa hadapan.

(7) Berdasarkan cadangan saksi pakar yang dikemukakan oleh perayu, perayu mungkin memerlukan pembedahan ortopaedik yang akan memakan belanja RM50,000. Walau bagaimanapun, hakim bicara cuma mengawardkan RM25,000. Alasan-alasan hakim bicara adalah wajar. Dalam mengawardkan RM350,000 kepada perayu, beliau telah mengambil kira kesemua kesakitan dan penderitaan.

(8) Tuntutan perayu sebanyak RM200,000 sebulan bagi kos pengangkutan dan perbelanjaan sara hidup apabila mencapai umur 18 tahun tidak dibenarkan kerana hakim bicara, dalam taksiran ganti ruginya, telah mengawardkan kos ubahsuai rumah untuk menyesuaikan keadaan buat perayu dan beliau telah mengambil kira jangka hayat perayu. Item tuntutan bagi percutian tidak pernah diawardkan oleh mahkamah-mahkamah.

(9) Hakim bicara telah menjalankan budi bicaranya dengan teratur di bawah A. 59 Kaedah-kaedah Mahkamah 2012 dan telah mengambil kira fakta-fakta relevan dalam mengawardkan jumlah RM100,000. Tiada alasan yang kukuh untuk mengganggu pelaksanaan budi bicara beliau kerana isu kos kekal di bawah budi bicara hakim bicara.

(10) Jumlah ganti rugi yang diawardkan oleh hakim bicara mesti diambil kira secara keseluruhannya dan bukan memperihalkannya item demi item kerana jika pun satu item kelihatan terlalu rendah, terdapat skop-skop dalam mana hakim bicara mungkin lebih bermurah hati.

Case(s) referred to:

Bolitho v. City and Hackney Health Authority [1997] 4 All ER 771 ***(refd)***
Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA ***(refd)***
Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal [2013] 8 CLJ 449 CA ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
Ramanaidu C Simansalom v. Kerajaan Malaysia & Ors [2011] 1 LNS 1524 HC ***(refd)***
Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***
Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28
Rules of Court 2012, O. 59

For the appellant - MS Dhillon (Khabir Dhillon with him); M/s PS Ranjan & Co
For the respondent - Nik Mohd Noor Nik Kar; SFC

[Editor's Note: Appeal from High Court, Shah Alam; Suit No: 21-229-2009 (affirmed)]

Reported by Najib Tamby

JUDGMENT

Rohana Yusuf JCA:

[1] The appellant's appeal concerns the assessment of damages ordered by the High Court at Shah Alam on 16 April 2013, resulting from a claim on medical negligence. The appellant, an infant suing through her father as her next friend, suffered from Quadriplegic Spastic Cerebral Palsy ('QSCP') arising from child birth and treatment at the respondent's hospital. At the date the matter was set for trial at the High Court, liability was agreed between parties and the trial proceeded only on the issue of damages. At the end of the trial the learned High Court Judge awarded a total sum of RM1,193,442.39 as damages together with interest and costs.

[2] The appellant contended that the sum awarded by the learned judge was manifestly low. Dissatisfied with some of the items of damages not taken into account, the appellant lodged this appeal which came before us on 24 February 2014. We have unanimously dismissed the appeal and our reasons are set out below.

[3] For convenience, we produce *in extenso* the damages as ordered by the learned High Court Judge:

Gantirugi Khas		
1.1	perbelanjaan perjalanan dan penginapan	RM2,100.00
1.2	kos dan perbelanjaan penjagaan	Tidak dibenarkan
1.3	kos pakaian khas, peralatan dan bahan lain	Tidak dibenarkan
1.4	kos rehabilitasi	RM9,600.00
Gantirugi Pra-Bicara		
1.5	perbelanjaan perjalanan	RM6,000.00
1.6	perbelanjaan medikasi	Tidak dibenarkan
1.7	kos penjagaan	RM15,980.00
1.8	kos baju khas, lampin, lampin pakai buang dan krim	RM2,380.00
1.9	kos percutian	Tidak dibenarkan
1.10	kos nutrisi tambahan dan makanan khas	Tidak dibenarkan
1.11	kos fisioterapi dan rehabilitasi	RM1,960.00
1.12	kos rawatan tradisional	RM3,600.00
1.13	kos kenderaan	RM40,495.72
1.14	kos pengubahsuaian rumah	RM26,666.67
Gantirugi Am		
1.15	kesakitan dan penderitaan dan kehilangan ameniti kehidupan	RM300,000.00

	Gantirugi Am Masa Depan		
1.16	kos rawatan dan kemasukan Hospital (RM1033 x 20 tahun)	RM20,660.00
1.17	kos fisioterapi, terapi pekerjaan dan terapi percakapan (RM560 x 12 bulan x 20 tahun)	RM134,400.00
1.18	kos membeli, membaiki dan penyelenggaraan alat bantuan mekanikal dan peralatan	RM136,000.00
1.19	kos pembantu rumah (RM800 x 12 bulan x 20 tahun)	RM192,000.00
1.20	kos penjagaan oleh ibu bapa dan keluarga (RM300 x 12 bulan x 20 tahun)	RM72,000.00
1.21	kos latihan dan pendidikan penjaga	Tidak dibenarkan
1.22	kos penjagaan berkala	Tidak dibenarkan
1.23	kos pembelian, penyelenggaraan dan pengubahsuaian kenderaan	RM89,000.00
1.24	kos pengubahsuaian rumah	RM80,000.00
1.25	kos baju khas, lampin, lampin pakai buang dan krim (RM140 x 12 bulan x 20 tahun)	RM33,600.00
1.26	kos pembedahan masa depan	RM25,000.00
1.27	kesakitan dan penderitaan bagi pembedahan masa depan	Tidak dibenarkan
1.28	kos penyediaan makanan berkhasiat	Tidak dibenarkan
1.29	kos penginapan dan saraan hidup apabila Inas mencapai umur 18 tahun	Tidak dibenarkan
1.30	kos pendidikan dan latihan khas	Tidak dibenarkan
1.31	kos percutian	Tidak dibenarkan

Faedah

1.32 faedah pada kadar 4% bagi gantirugi khas dari tarikh kejadian 14 May 2007 hingga tarikh penghakiman 16 April 2013;

1.33 faedah pada kadar 5% bagi gantirugi am bagi kesakitan dan penderitaan dan bagi gantirugi pra-bicara dari tarikh penyampaian writ 17 Ogos 2009 hingga tarikh penghakiman;

1.34 faedah selepas penghakiman pada kadar 5% daripada 16 April 2013 hingga ke tarikh pembayaran jumlah gantirugi; dan

Kos

1.35 Kos sebanyak RM100,000.00 bagi pihak Plaintif.

Principle In Assessing Damages And Appellate Interference

[4] It is trite law that an appellate court will not interfere with the decision of a trial judge unless it is satisfied that the judge has acted on a wrong principle of law or has made a wholly erroneous estimate of damage suffered either due to an omission to consider relevant materials or an admission of irrelevant considerations (*Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1985] 2 MLJ 22).

[5] The purpose of award of damages is to provide monetary compensation for the harmful consequences suffered by the injured. Damages for personal injuries cannot be punitive and still less a reward (see *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324. Hence it must be taken as compensatory and not to punish a defendant or even to make him a lesson for others. In *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292, the Federal Court after stating the principle and purposes of damages went on to state that "damages must be fair, adequate and not excessive". In doing so the court would have to address its mind to the harm, injury, damage or loss suffered by the plaintiff, not the nature of defendant's neglect, act, or omission. The plaintiff on the other hand is under a duty to mitigate the loss he suffered.

[6] Mindful of the above principles, we find judgment of the learned trial judge was in adherence. The learned judge had, at the forefront of her mind the compensatory principle and had generally conducted her assessment on that principle and other accepted principles. The learned judge further reminded herself that a claim for damages cannot be made with an objective of enriching one self.

[7] We listed below our deliberation on each of the items complained by the appellant.

Special Damages – Care By Parents

[8] The learned High Court Judge disallowed the claim for cost of nursing care provided by the appellant's mother from birth until about two years old. Learned counsel for the appellant submitted that the learned trial judge fell into error by relying on her own personal opinion and failed to give due regard to an expert opinion on this matter as stated in *Bolitho v. City and Hackney Health Authority* [1997] 4 All ER 771.

[9] Upon our scrutiny of the judgment we find that Her Ladyship dismissed this item of claim because she found from the evidence and the circumstantial surrounding facts, that the care for the appellant from birth to age two was not different from that of a normal child. In coming to this finding the learned judge relied on the evidence of the appellant's mother (SP3). SP3 was a kindergarten teacher. In her evidence she accounted her daily routine in caring for the appellant from birth to age two. According to her, before going to work she fed the appellant and sent her to a babysitter

at 7.30am. Upon her return from work at 2pm she took the plaintiff home, fed her again and put her to sleep and carried out her normal routine. The evidence that the babysitter had taken care of the appellant with three other babies supported the learned judge's finding. Furthermore, besides doing her babysitting, the babysitter also baked kuih which she placed at a shop nearby to supplement her income.

[10] When asked during cross-examination if she would have otherwise brought the appellant with her to her kindergarten, SP3 said even if the appellant had been a normal child she would only bring her along to her kindergarten upon reaching age five or so. SP3 also agreed that the cost of taking care of the appellant during such infancy would be the same as that of an ordinary child. Clearly, the learned judge had good ground in making her finding by relying on the direct evidence of the appellant's mother who cared for the appellant.

[11] We do not find any error in the learned judge's analysis of the evidence on this issue. We agree with the learned judge that she could not have forsaken the mother's own evidence and to rely on an expert evidence which in any event, is purely an opinion. We have no reason to disturb a finding of fact by the learned judge as she had the audio-visual advantage of hearing the appellant's mother accounting her real life experience in taking care of the appellant in person. On the other hand, the expert opinion on such a subject would be a mere opinion which the learned judge was not bound to accept, especially so in the face of the mother's own experience. In our view the evidence relied by the learned judge is the best evidence before her. We have no reason to disturb it as we find the learned judge employed the right test enunciated by the Federal Court in *Yang Salbiah* (*supra*) in dismissing this claim. The learned judge adhered to the principle of reverting the appellant's position to that which she would have been without the negligence.

Pre-Trial Damages – Nutritional Food

[12] The appellant's claim for nutritious food at RM400 per month for 44 months was likewise dismissed by the learned trial judge based on two main reasons. First, in our view Her Ladyship correctly observed that it has always been the duty of parents to provide nutritious food to their children and there was no expert finding that the appellant required extraordinary food. Secondly, the evidence of the appellant's mother (SP3) who said the appellant is fed with a normal diet, except that it had to be blended to make it soft. She would normally send the appellant's food together with the appellant to the babysitter who then needed to warm it before feeding the appellant. We therefore agree with the learned judge this item of claim should be dismissed.

Multiplier And Multiplicand

[13] Learned counsel complained of the multiplicand of 20 used by the learned judge in the award of some of the items for future damages. On the issue of multiplier, we note the expert evidence on life expectancy of the appellant which was said to be between 30 to 40 years. Learned counsel contended that the benefit should lie in favour of the appellant and the learned judge should have taken 40 as the age. Taking 40 as the age and deducting the age at trial which was five, would give us 35. Thus applying the normal practice of deducting 1/3rd the multiplicand of 24 should have been used by the learned trial judge. It was submitted that the learned judge fell into error in taking life expectancy of 36, taking into account the middle point of 30 to 40 because there is no principle in law that requires the learned judge to do so.

[14] We agree with the learned Senior Federal Counsel's ('SFC') submission for the respondent that the testimonies of rehabilitation experts (SP4 and SD1) on the life expectancy were pure estimates since there is no statistics on Malaysian experience. The statistics relied upon by the experts in providing the estimate were based on the European experience.

[15] In the circumstances, we agree with the submission by the learned SFC that it was not wrong for the learned judge, on the facts before her, to estimate the life expectancy within the range. It must also be noted that the estimate by the appellant's own expert SP4 also did not confirm if the case of Cerebral Palsy treated by him was one that occurred at intrapartum like in the present appeal. As such we do not find error in the multiplier of 20 used by the learned trial judge and we have no reason to disturb the same.

Future Damages

[16] Learned counsel for the appellant contended that, as a result of the use of 20 as the multiplicand instead of 24, the claim for future damages was lessened by four years. This resulted on the claim for some of the items, for future damages to be manifestly low. There were some items of claim for future damages which were dismissed or not granted in full by the learned judge, which the appellant appealed upon as listed below.

Future Claim – Medical Care

[17] Under this head of claim the appellant sought for cost of treatment at a private hospital. The learned judge allowed a claim at RM1,033 per year as opposed to the amount of RM4,200 per year as claimed by the appellant. Learned trial judge found that the medical attention required by the appellant would be in the area of physiotherapy and rehabilitation. She noted that such services would be available at the public hospital which the appellant being categorised as "Orang Kurang Upaya" would be entitled to get. The reason given by the father for not pursuing the treatment at the public hospital because of long wait according to the learned judge was not sufficient proof of non access. This was because the father had only made one attempt to

obtain service at Sungai Buloh Hospital which would not justify the choice for private hospital treatment. The learned judge further took into account that the appellant's father, a retired teacher, would be able to obtain the facilities provided by the public hospital and would not justify him choosing private hospital for treatment.

[18] We find, in assessing this head of claim, the learned trial judge had already taken into account the increasingly better medical services found in the public hospitals, the fact that there was no evidence to show that the appellant was denied treatment at public hospitals, and then proceeded to allow only 1/3 of the claim. This is in line with the principle laid down in *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321; [2004] 2 MLJ 465 and *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal* [2013] 8 CLJ 449; [2013] 4 MLJ 785. This court in *Gleaneagles Hospital*'s case had granted 1/3 of the amount claimed based on the rate charged by private hospitals on the reason that a patient has an option to seek treatment at either a public or a private hospital.

[19] In this regard we are not persuaded by the submission of learned counsel for the appellant that the award is not consistent with s. 28 of the Civil Law Act 1956, and that the provision and availability of public medical services are not mandatory on the Government as there is no legislation to compel such services. Hence this may lead to uncertainty. We are unable to agree with that argument. Public medical services are available mandatory or otherwise. We therefore find the order of the learned judge is in line with current practice.

Future Claim – Equipment

[20] Learned counsel submitted that there were testimonies of three experts, Dr Balwant Singh Bains (SP2), Dr Lydia (SP4) and Dr Chern (SD1) on the need of equipment for the appellant. At the end of the day the learned trial judge accepted and was guided by Dr Chern's recommendation and awarded a sum of 136,000 for the claim of future equipment.

[21] Learned counsel submitted that the learned judge fell into error in not considering the recommendation of both Dr Lydia's recommendation totalled to RM326,000 together with the recommendation of Dr Bain of another RM225,600. The award of the learned judge under this head of claim was said to have fallen short of RM415,600 because the total recommendation by Dr Lydia and Dr Bain was RM551,600.

[22] Learned counsel submitted that, the learned Judge fell into error for ignoring the recommendation of Dr Lydia and Dr Bain and for giving preference to the recommendation of Dr Chern. Again even on Dr Chern's recommendation the learned judge did not allow the amount on repairs and renewals.

[23] It was further submitted that Dr Chern was not an independent expert witness because she came from the same department as the tortfeasors. Relying on "The Guidelines of the Malaysian Medical Council 002/2006" learned counsel contended that Dr Chern should not appear as an expert witness. Learned counsel further cited decision of High Court in *Ramanaidu C Simansalom v. Kerajaan Malaysia & Ors* [2011] 1 LNS 1524, Johor Bahru High Court Suit No. 22-860-2006 (unreported).

[24] The learned trial judge is assessing this item of claim had already scrutinised the proposals by all the three expert witnesses on the type of equipment required by the appellant by taking into account factors such as the physical built, the living condition and home environment as well as the mental state of the appellant to conclude that the proposal made by the respondent was reasonable. In this regard the learned trial judge analysed the proposed equipment and questioned herself on the need of the equipment as proposed by the appellant through the expert witnesses. In her finding she made the following observation:

> ... saya menimbangkan keupayaan Plaintif untuk menggunapakai semua peralatan yang disarankan. Rumah Plaintif adalah rumah teres satu setengah tingkat. Saya berpendapat tiada keperluan untuk Plaintif untuk naik ke tingkat atas menggunakan perkakas yang disarankan. Tahap perkembangan mental kanak-kanak tidak dibuktikan. Oleh itu sama ada Plaintif boleh menikmati dan menghargai apa yang ada di ruang atas tidak buktikan. Apa yang saya dapati ialah hujahan Defendan mengenai peralatan yang dipelukan oleh Plaintif adalah lebih munasabah, bersesuaian dan lebih praktikal untuk kegunaan seorang yang mengalami kecederaan seperti Plaintif.

[25] We find that the order made by the learned judge was well reasoned and we did not find any error by the learned judge in coming to her conclusion on this item.

Future Claim – Maid

[26] The claim for the services of two Filipinas to care for the appellant was found to be excessive by the learned trial judge. The claim was for RM27,000 per year at RM1,500 per month x 1 1/2 maids. The learned judge found that the help of an Indonesian maid would be more appropriate and less expensive. The learned trial judge in our view made correct inference that there would be no necessity for two maids to care for the appellant relying on her own assessment and looking at the appellant in court. She found the appellant's physique would not pose any difficulty in handling as the appellant only weighed 9kg at age of six years. She found the appellant would not be active like a normal child and hence there would be no reason why two maids would be required. She was also correct in her analysis that in fact two maids would be a problem logistically.

Future Claim – Care And Parent's Stress

[27] The learned judge explained that the award she made for cost of future care by the parent at RM300 per month was premised on 1/3 of the amount claimed at RM800 per month. The principle of granting 1/3 claim for future cost is an acceptable principle for future award of future damages (see *Chai Yee Chong* and *Gleneagles*).

Future Claim – Training And Education For Care Giver

[28] The learned trial judge did not allow the claim for training for the care provider because she did not find any need to do so. In her observation the appellant's mother who was a kindergarten teacher would be able to guide the care provider. We agree with the learned trial judge that the mother would provide the best way to care for her own child, normal or otherwise. For that, we did not find any error on the part of the learned judge in dismissing this item of claim.

[29] The learned judge also dismissed this item of claim as she found no necessity for the training in view of the parent's experience. Furthermore free trainings of this nature is available at public hospitals where it is accessible to the appellant's parent to benefit from.

Future Claim – Respite Care

[30] In her judgment the learned judge dismissed this claim for want of proof. We agree with the learned trial judge that this claim should be dismissed. The learned judge noted that respite care would be normally left to close family members as testified by SP4, taken into consideration the Asian family tradition. Furthermore the appellant had been granted cost of hiring maid to assist. We agree with the learned SFC that the reliance made by the appellant on the case of Aaliyah Syahril Rizal is totally misplaced because in that case the cost of respite care was granted by consent of parties.

Future Claim – Disabled Vehicle

[31] It was the contention of the learned counsel for the appellant that the award given by the learned judge for future cost of purchase and repair and maintenance (ie, petrol, road-tax & insurance) of a disabled friendly vehicle was manifestly low. The appellant claimed the cost of vehicle at RM122,000 with vehicle replacement every seven years at RM17,428 per year. The learned trial judge awarded RM89,000 as a one-off purchase for 20 years at RM4,450 per year.

[32] In her judgment Her Ladyship found the item of claim as proposed as "terlalu tinggi dan melampau". The car model suggested by the appellant according to the learned judge was of luxurious class. She found the proposal by the respondent more appropriate in the circumstances and allowed the claim as proposed by the respondent. We see no reason to disturb her assessment relying on *Yang Salbiah*.

Future Claim – Clothings/Disposable Diapers Etc

[33] The appellant's claim was in the sum of RM500 per month for future cost of special clothes, diapers and creams. On evidence the learned judge found that the more relevant need of the appellant would be the disposable diapers. The learned judge then proceeded to award the damages for the cost of diapers at RM140 monthly or RM1,600 per year. We do not find error in the exercise of Ladyship's discretion on this item relying on the evidence and the factual circumstances of this case.

Future Claim – Pain And Suffering From Surgery

[34] The claim of the appellant was premised on the recommendation by the expert Dr Lydia that the appellant may require orthopaedic surgery due to left hip dislocation. Such surgery would cost RM50,000. The learned judge awarded a sum of RM25,000. It was contended that the award did not take into account the related pain and sufferings from this surgery on top and above the suffering from cerebral palsy. The learned trial judge had earlier awarded RM350,000 for pain and sufferings. In her judgment Her Ladyship said she had already factored in all the pain and sufferings of the appellant in awarding this sum. It would not be possible to assess a separate pain and suffering specific to future surgery as we find the learned judge had already assessed the pain and sufferings suffered by the appellant even if there would be a future surgery would all be resulting from the CP suffered. We agree with the learned judge as we find her reasons justified.

Future Claim – Nutrition

[35] The learned trial judge dismissed this item as she found no evidence to support the contention that there is a need for any special dietary requirement for the appellant. We have no reason to interfere with the learned judge's findings of facts.

Future Claim – Post 18 Years Old

[36] The appellant claimed an expenses of RM2,000 per month for future cost of accommodation and living expenses upon the appellant reaching the age of 18 years but was disallowed. The reason given by the learned judge was because in her assessment of damages she had awarded cost for modification of the house to accommodate the appellant and that she had taken into account the life span of the appellant.

Future Claim – Holidays

[37] The learned judge dismissed this claim as she found that cost of holiday is not peculiar to the negligence of the respondent as it is a cost that a family would have incurred in any event. Furthermore the learned judge found that this item of claim has never been awarded by the courts. The reliance placed by the appellant on a case that is decided by way of consent

is totally misplaced. The Federal Court also dismissed the same item of claim in the *Gleneagles*'s case on 7 August 2014 (see W-02-2662-10/2011 and W-02-2661-10/2011).

Costs

[38] The appellant was dissatisfied with the costs awarded by the trial judge in the sum of RM100,000. We note that in the written submission by the appellant's counsel at the High Court (at p. 873) learned counsel sought for a sum of RM115,000 as costs on liability proceedings being RM100,000 as getting up fees and RM15,000 as out of pocket expenses. From the appeal records the proceedings on damages were held for five days.

[39] It was submitted that because the respondent had only agreed on the issue of liability on the day of trial despite repeated proposals made by the appellant, the full costs should be awarded. The appellant also contended that the costs awarded deviated from the trend and principles regarding costs for medical negligence suit. Before us learned counsel submitted that, before trial he sought for a total costs of RM115,000 on liability. After trial the appellant further incurred RM30,000 as out of pocket expenses and sought for a reimbursement of the same.

[40] We agree with the learned trial judge that though the agreement on liability took place only on the day of trial, it had no doubt lightened the burden of the appellant and the appellant's counsel and shortened the days of trial. The learned trial judge took into account the fact that the same expert witnesses would have been involved if the trial on liability had proceeded. In our view she had exercised her discretion properly under O. 59 of the Rules of Court 2012 and had taken into account the relevant facts in awarding the sum of RM100,000. We do not find any good reason to disturb her exercise of discretion as the issue on costs remains a discretion of the trial judge.

[41] In conclusion, having perused through the award of damages, we are of the view that the total damages awarded by the learned trial judge must also be taken as a whole instead of particularising it item by item because even if one item appears to be too low there are areas where the trial judge may be more generous. For this reason also we are constrained to interfere with the findings unless they were made premised on wrong application of legal principle or an exercise of discretion without factual or legal basis.

[42] Having analysed each of the items raised on appeal, we are of the considered view that on the facts and circumstances of this case, the award of damages was correctly made relying on accepted legal principles and normal practice. We therefore dismissed the appeal of the appellant and we make no order as to costs.